IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77—476

TOWNS OF NORWOOD, CONCORD and WELLESLEY, MASSACHUSETTS,

Petitioners,

v.

BOSTON EDISON COMPANY,

Respondent.

MEMORANDUM OF THE READING MUNICIPAL LIGHT BOARD IN SUPPORT OF PETITION FOR CERTIORARI

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The Reading Municipal Light Board, Reading, Massachusetts ("Reading"), a party below and a respondent here, supports the petition for writ of certiorari filed by the Towns of Norwood, Concord and Wellesley, Massachusetts

("the Towns") on September 26, 1977.[1] As the Towns note, there are two issues here of substantial consequence to the administration of the Federal Power Act, and to administrative law in general, quite aside from the fact that even those respondents supporting the result below will not be able to assert that the court below was correct in several of its assertions of "fact" logically essential to the result reached.

I.

The Towns correctly note that the court below, apparently upset with the general vacillation by the Federal Power Commission in recent years on many issues, has decided to impose its own views as to the meaning of a particular regulation, which views were contradictory to those of the agency. As the Towns note, such a result is contradictory, as well, to the teachings of this Court in *Udall v. Tallman*, 380 U.S. 1, (1965), and other cases, but the context of this case may not be entirely clear from the petition.

The FPC (and now its successor in interest, the Federal Energy Regulatory Commission ("FERC") sets wholesale electric and natural gas rates based upon a "test year" cost of service which accumulates all costs for a twelve month period so that the matching revenue level can properly be set by designated rates. By a rulemaking order in mid-1973, the FPC chose to alter its past practice of setting rates upon an actual twelve month period for which data were available, modified for known

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[1]Reading's limited financial resources did not allow for the incurrence of costs associated with a separate petition for certiorari. Reading, like the Towns, is a wholesale customer of Boston Edison Company ("Edison"), and, like the Towns, relied upon the apparent validity of an order of the Federal Power Commission ("FPC") rejecting a rate increase filing by Edison which did not comply with the terms of the governing regulation. Thus, Reading did not raise its rates to its citizen-consumers until the FPC permitted Edison's rate later filed in conformity with the regulation to go into effect. Edison, relying on the decision below, now seeks to extract from Reading nearly $800,000 which Reading did not collect from its customers.

changes, in order to set rates based upon twelve month data projected by the filing utility. Filing of Electric Service Tariff Changes, Order 487, 50 FPC 125, rehearing denied, 50 FPC 736 (1973), affirmed, *American Public Power Association v. FPC*, 522 F.2d 142 (D.C. Cir. 1975). In establishing the "future test year", however, the FPC chose to retain one crucial link to reality, to impose a brake on the imagination of those utilities filing for higher rates. In addition to the projected twelve months data for "Period II", which formed the basis for the "test year" upon which rates were to be set, the FPC required the filing of actual twelve months data to form a "Period I", which data was required to reflect "the most recent twelve months of actual experience". 50 FPC 128. Thus, the regulation in effect at the time of the Boston Edison filing here at issue, 18 CFR 35.13(b)(4)(iii) (1975), required, in this regard, that

> "The statement of the cost of service should contain unadjusted system costs *for the most recent twelve consecutive months for which actual data are available (Period I)* including return, taxes, depreciation, and operating expenses, and an allocation of such costs to the service rendered. The statement of cost of service shall include an attestation by the chief accounting officer or other accounting representative of the filing public utility that the cost statements and supporting data submitted as a part of the filing which purport to reflect the books of public utility do, in fact, set forth the result shown by such books." [Emphasis added].

50 FPC 130. It is this "Period I" tie to reality that was at issue in the decision below.

The court below held (so far as one can tell) that since the FPC had apparently accepted filings made by utility companies during 1974 with a Period I consisting of the "most recent calendar year" of 1973, that "these regulations permitted cost of service data of the most recent *calendar year* for Period I." 557 F.2d at 848. Thus, it held, the FPC had erred in rejecting the Edison filing at issue here because it did not conform with the requirement of the regulations that the Period I data be the most recent twelve months data available.

The difficulty was this rationale is twofold. First,it is based on "facts" that are twisted beyond recognition and wholly incorrect.[2] Second, and more importantly, the court below has expressly ignored the fact that in the only cases under this regulation in which the FPC addressed the issue at all, it had enforced its regulation in a manner consistent with its action which the court reversed. As the Petition points out, the only cases known in which the FPC has addressed this issue support the interpretation of the regulation by the FPC below which the court reversed. Thus, in *Minnesota Power & Light Company*, Docket No. E-8494 (December 6, 1973) and *Public Service Company of New Hampshire*, Docket No. E-9290, 5 FPC 5-818 (1975); the Commission expressed its view that the regulations required the most recent twelve month data available for purposes of the Period I tie to reality, and, of course, in its original rulemaking order, 50 FPC at 128, it refused to alter its regulations to allow Period I to be "the most recent calendar year" because

> "Our review of the comments. . . does not alter our belief that Period I should be the most recent twelve months of actual experience. With Period I so described, we will have the most recent available data with which to analyze the normality or abnormality of estimated costs vis a vis actual historical experience."

Consequently, and of substantial importance to regulation under the Federal Power and Natural Gas Acts, the court below

[2]Thus, for example, the Court of Appeals decision quotes (at 847) a section of Order No. 487 concluding that *Period II* data may be filed on a calendar year basis, and what must be an interpretation of a statement of inexperienced FPC counsel at argument that:

> "The FPC concedes that utility companies interpreted Order No. 487 to allow Period I cost of service data to be filed on a calendar year basis." (at 487-488)

to conclude that *Period I* data was permitted by the regulation to be on a most recent calendar year basis. As the Towns point out, however, Petition at pp. 5-6, the FPC, in setting up its future test year regulations, expressly *refused* to amend its regulations to allow Period I data to be filed on a most recent calendar year basis.

has effectively held that although the regulation itself was clear—that the tie to reality provided by Period I was required to be *the most recent twelve months data available*—the meaning of the regulation was reversed, to something expressly rejected in the promulgation of the regulation by previous inconsistent actions by the agency. So far as Reading can determine, this is the first time that a court of appeals has reversed an administrative agency holding that the agency could not enforce the plain meaning of its regulation because it had accepted inconsistent filings (without written ruling) in the past, and therefore that the regulated industry had a right to rely on the agency's non-enforcement of its regulation. If this standard were to prevail, given the recent past history of many agencies, (expressly including the FPC), no regulation or ruling would be enforceable. The fact of the matter is that the regulation was plain—it required the most recent twelve months data available to be filed as Period I. It is also clear that all parties knew that the Commission had, in promulgating the regulation under which Edison sought to extract several million dollars per year from its customers, refused to amend its proposed regulation to accept Period I data for the most recent calendar year unless that were also the most recent twelve months data available. All parties also knew, or should have known, of the Commission's orders in 1973 which rejected filings which were made with calendar year Period I data which was stale. In fairness, all parties also knew that, in the latter part of 1974, the Commission had accepted several rate filings which did not conform to the Period I regulations, having utilized calender year 1973 data for Period I. But Edison, since its attorneys were the same as the attorneys for Public Service Company of New Hampshire, should have known that the FPC, at the beginning of 1975, indicated its intention to enforce its regulation in refusing to accept the Public Service Company of New Hampshire filing on the grounds that its Period I was merely "the most recent calendar year for which the Company had data compiled", rather that "the most recent twelve consecutive months for which data were available". *Public Service Company of New Hampshire*, 5 FPS 818 (1975). In the Commission's last order in that case, issued on June 4, 1975, the Commission noted, in rejecting Public Service Company of New Hampshire's application for rehearing of the rejection of its February 1975 filing, at 5 FPS 819:

> "The Company's contention that those data offered do reflect costs for the most recent twelve consecutive months for which data are available is a strained construction of that phrase. Regardless of whether they have been converted into cost of service form, the more recent 1974 data are available. It has not been satisfactorily demonstrated that the 'undue delay' incurred in requiring the preparation of cost of service figures based on the more recent data cannot be overcome with an applied effort."

Similiarly, Edison has never done more than hint that perhaps its Period I data complied as filed. Of course, it would be difficult for it to do so, since at the time of the mid-August 1975 filing here, with calendar 1974 as Period I, it already had filed with the Securities and Exchange Commission on August 1, 1975, and forwarded to its shareholders, an extensive statement of results for the six and twelve months ending June 30, 1975, and had filed with the FPC itself by July 28, 1975, detailed Form 5 monthly reports of electric operations, income and revenue for all months through June 1975.[3] As in the case of Public Service Company of New Hampshire, Edison clearly declined to put the resources necessary to make a non-stale filing in this case because it obviously felt that the FPC was unlikely to follow its own regulations in this area.[4]

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[3]Edison also maintains an even more extensive internal reporting system for its officers which breaks down operation data in detail and is rarely more than a month behind actual results, a fact well known to all who have litigated against it.

[4]After the rejection here, Edison filed anew, on January 23, 1976, a filing with data less than four months old for Period I. It is also worth noting, in view of Edison's carefully worded statement in this regard, that when Edison was defending the Commission's Order No. 487 originally providing for "future test year" ratemaking, it asserted in its brief to the court of appeals in *American Public Power Association v. FPC, supra*, at p. 16, note 1, that the "typical chronology" under Order 487 would include a rate filing in April, using calendar year data for the just completed year for Period I.

While it may be unfortunate that the FPC had failed, in 1974, to enforce its regulations, we are not aware of any other case in which mere failure to enforce a clear regulation (which had already been interpreted both in the promulgation of the regulation itself and in contemporaneous orders), even for a period of a year, precludes an agency from doing so when it has never formally changed its view. The court below might well have held that the FPC could not legally have accepted the filings it did in the latter part of 1974 without explaining its reversal, but we find it difficult to understand how it could hold that an agency which does not, for a period, enforce the law or its regulations designed to protect one class is barred from again enforcing the law or its regulations simply because the class against which it was supposed to protect another has acquired an expectation—even a reasonable one—that the regulations or law will not be enforced.

II.

The remedy chosen here—even if the agency were wrong, as it was not—is a startling one. The court below held that, if the FPC had been wrong in rejecting the filing as not in conformity with its regulations, it would be ordered to make the filing effective on the date which, in its view, the Commission would have made it effective had it acted properly. Thus, Edison has filed for, and the FPC has permitted,[5] a mechanism to recover approximately $2 million which Edison asserts it did not recover but should have recovered between February 26, 1976, and July 23, 1976, when its filing, as updated, was allowed to become effective. The Towns correctly note the cases which hold that, in a situation where an agency is established to mediate between conflicting interest groups (here consumers and producers of electric power and energy), the consumers should not be forced to pay for the errors of the agency if it is later found that the agency allowed too little initially. See *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-153 (1962). At the very least, the situation is analogous to that where a stay is granted by a court and later dissolved.

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[5]Subject to pending motions to stay and for rehearing and reconsideration, and subject to eventual refunds as to amounts over the rate determined to be just and reasonable.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari filed by The Towns. Reading believes this case to be appropriate for summary reversal on the papers which will be filed before the Court, but in any event, we believe it clear that there is error demonstrable here of a sort which can infect or defeat the entire regulatory process. As this court stated in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, at 47[6],

> "... although it is regrettable that the road which led to these ... requirements could not have been straighter, we hold that the Commission did not exceed its authority."

The road that led to the requirements there at issue was certainly no straighter than the road which led to the regulation enforcement which the court below reversed.

Respectfully submitted,

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[6]The Towns seem to have missed, in proofreading, the elision of a case citation from their petition at 23, which quotes *Sunray DX, supra*, at 47, rather than *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), as the incorrect passage would suggest.